IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-49

SOUTHERN RAILWAY COMPANY,
and
LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Petitioners,

v.

BUFORD ELLINGTON, GOVERNOR, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Petitioners (hereinafter referred to as "the railroads") pray that a writ of certiorari issue to review the order of the Supreme Court of Tennessee entered in these cases on April 10, 1978.

OPINIONS BELOW

The opinion of the Chancery Court of Davidson County, Tennessee, dated January 28, 1976, unreported, is printed in Appendix A hereto. The original opinion of the Court of Appeals of Tennessee, Western Section, dated December 3, 1976, unreported, is printed in Appendix B. The substitute opinion of the

Court of Appeals of Tennessee, Western Section, dated February 25, 1977, unreported, is printed in Appendix C.

JURISDICTION

The orders of the Supreme Court of Tennessee denying the railroads' petitions for writs of certiorari to the Court of Appeals of Tennessee, printed in Appendices D and E, were entered on January 16, 1978. The orders of the Supreme Court of Tennessee denying the railroads' timely petitions to rehear, printed in Appendices F and G, were entered on April 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Where Tennessee courts have found that the application of a Tennessee statute has denied the railroads equal protection of the laws, may the Tennessee courts excuse such constitutional violations and deny the railroads immediate relief because of assumed disruption to local finances?

II. May Tennessee courts deny review of a substantial federal question on a novel procedural ground unsupported by prior law, where the existence of such ground could not have been known in time to comply and where compliance was in any event a practical impossibility?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the equal protection and due process clauses of the fourteenth amendment to the United States Constitution, printed in Appendix H hereto, and article 2, § 28, of the Tennessee Constitution, printed in Appendix I.

The statutes involved are Chapter 325 of the Tennessee Public Acts of 1967, printed in pertinent part in Appendix J; Tennessee Code Annotated, (hereinafter cited T.C.A.) § 67-929 (1955), printed in Appendix K; T.C.A. §§ 27-901, 902 (1955) printed in Appendix L; and T.C.A. § 67-1105 (1955) printed in Appendix M.

Throughout the text, references to the Appendix will be designated by "App. ——".

STATEMENT OF THE CASE

These cases involve discriminatory ad valorem tax assessments in Tennessee for the year 1968. The cases presented by this petition constitute two of twenty-four separate state certiorari proceedings filed in the Chancery Court of Davidson County, Tennessee, against the Tennessee State Board of Equalization seeking review of the ad valorem tax assessments of the principal interstate railroad companies doing business in the State of Tennessee for the years 1968 through 1972. On May 3, 1976, the Tennessee Court of Appeals entered a consent order finding that these two cases presented every issue to be determined in all the tax lawsuits before the court and ordered that all twenty-four suits would abide the results of these cases.

For 1968 and for all periods relevant hereto, article 2, § 28 of the Tennessee Constitution provided in part:

> "All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value . . . ."

Under Tennessee law, public utility property, including that of railroads, was (and still is) centrally assessed by the Tennessee Public Service Commission whereas non-utility property was (and still is) locally assessed by county assessors. For many years railroads suffered from discriminatory assessment practices in that their property was assessed by the Public Service Commission at or near actual cash value, the statutory criterion, while locally assessed property was assessed by county assessors at substantially less than actual cash value, thus subjecting railroad property to an unlawfully disproportionate share of the total property tax burden in Tennessee.

In 1966, the Tennessee Court of Appeals held in *Southern Railway* v. *Clement,* 57 Tenn. App. 54, 415 S.W.2d 146 (1966) *cert. denied* (1967), that the assessment of local property at less than actual cash value was illegal and void and ordered local assessments raised to actual cash value in future years. In the same year, the United States District Court for the Middle District of Tennessee held that the plaintiff railroad was entitled to have its current assessment reduced to eliminate discrimination. *Louisville & Nashville Railroad* v. *Public Service Commission,* 249 F.Supp. 894 (M.D. Tenn. 1966), *aff'd* 389 F.2d 247 (6th Cir. 1968).

Thereafter, the Tennessee legislature enacted Chapter 325, Public Acts of 1967 (hereinafter, Chapter 325) (App. J), which provided in part that, beginning in 1968, public utility property should be assessed at 50% of value, while locally assessed property should be assessed at the higher of (a) the median assessment ratio prevailing in the county or city in

the years 1967, or (b) in accordance with the following schedule:

Tax year	*Percentage of value as defined by law*
For 1968	15%
For 1969	25%
For 1970	30%
For 1971	35%
For 1972	40%
For 1973 and thereafter	50%

Within the time prescribed by state law, the railroads appeared before both the Tennessee Public Service Commission and the State Board of Equalization to complain that assessments made pursuant to Chapter 325 violated the uniformity and equality provisions of the Tennessee Constitution. The State Board nevertheless failed to equalize the railroads' assessments with the assessments of all other property as required by the Tennessee Constitution and the decisions referred to above.

Within the time required by law, the railroads filed with the Chancery Court of Davidson County, Tennessee, petitions for writs of certiorari seeking review of the final assessments of the State Board of Equalization. (Writ of certiorari was the only method available under Tennessee law for railroads to obtain judicial review of their assessments.) The railroads alleged in their pleadings that their property had been assessed at 50% of value, while locally assessed property had been assessed at substantially less than 50% of value in violation of the Tennessee Constitution, thereby depriving the railroads of equal protection of the laws contrary to the fourteenth amendment

to the United States Constitution and comparable provisions of the Tennessee Constitution.

The Chancery Court found that Chapter 325 did not comply with the uniformity requirements of the Tennessee Constitution. Nevertheless, the Chancery Court denied any relief because it was concerned that severe fiscal disruption might result, despite the absence of any evidence in the record relating to fiscal disruption, if the railroads were immediately afforded their rights. The Chancery Court held, therefore, that Chapter 325 was a reasonable approach designed by the legislature to move from a long-practiced violation of the Tennessee Constitution to a constitutionally acceptable system of assessing railroad property. *See* App. A, p. 11a.

The railroads appealed this decision to the Tennessee Court of Appeals. In their appeals, they raised essentially the same points asserted before the Chancery Court, denied the constitutional adequacy of the reasons advanced by that court as the basis for withholding relief, and further asserted in their assignments of error that the Chancery Court's decision deprived the railroads of their federal constitutional rights to due process. In an opinion filed December 3, 1976, the Court of Appeals held:

> "The record reveals, however, that the application of the statute did create two classes of property: that assessed on a state wide basis by the Board of Equalization at one rate, and that assessed at varying rates by the local taxing authorities. This application of the statute is clearly in violation of the then existing Article II, Section 28, of the Constitution of Tennessee. *Southern Railway Company* v. *Clement,* (Tenn. App. 1966) 415 S.W.2d 146; *Louisville and Nashville Railroad Company* v. *Public Service Commission* (1966) 249 F.Supp. 894, affirmed at 389 F.2d 247." App. B, pp. 21a, 22a.

Nevertheless, the Court of Appeals declined to review the holding of the Chancery Court and held instead that the railroads were not entitled to a review of their assessments because they had not alleged in their petitions that they had paid their taxes under protest:

> "We therefore hold that payment under protest must have been made to each local governmental entity which received payment of taxes under the assessments attacked before the taxpaying railroad company can have a review of the assessment for a refund of any excess taxes paid. This fact must be accomplished and shown on the petition for certiorari to the Board of Equalization before the taxpaying railroad has standing for a review. T.C.A. § 67-929." App. B, p. 24a.

The Court of Appeals found that there had been no showing that the railroads had paid their taxes under protest. The question of payment under protest had not been previously raised at any stage of the proceedings either by the state Attorney General or by the Chancery Court.

The railroads filed petitions to rehear in which they asserted that the procedural rule set forth by the Court of Appeals was not in accord with Tennessee law, and that it was impossible to have paid their taxes under protest prior to filing their petitions for writs of certiorari.

On February 25, 1977, the Court of Appeals withdrew its opinion of December 3, 1976, and filed a sub-

stitute opinion in which it adhered to its previous holding that payment under protest is a condition precedent to review of assessments and that such payment must appear of record. In response to the railroads' assertion that payment under protest prior to the filing of the petition for certiorari was impossible, the court modified its original opinion and held that in any case where the railroads found it impossible to pay the tax under protest prior to filing the petition, they must allege in their petitions the impossibility of such payment, and must also allege that their taxes will be paid under protest and that the fact of such payment will be shown to the court by supplemental pleading. The court then stated:

> "Thereafter, when the railroad company, using due diligence, pays its taxes under protest it need only establish that fact by supplemental pleading and it can have its review of the assessment." App. C, p. 35a.

The railroads filed petitions for writs of certiorari with the Supreme Court of Tennessee in which they asserted that the holding of the Court of Appeals was without warrant or support in Tennessee law and that, at most, the failure to allege payment under protest constituted an affirmative defense which, not having been raised by the pleadings of the defendants, must be deemed waived. They also asserted the same points which had been presented to the Court of Appeals.

On January 16, 1978, the railroads' petitions for writs of certiorari were denied by the Tennessee Supreme Court without opinion. The supreme court denied the petitions "with concurrence in results only." *See* App. D, p. 37a; App. E. p. 38a.

The railroads filed timely petitions to rehear and filed timely supplements to those petitions. In their supplements, the railroads asserted that the disposition on state procedural grounds of the substantive issues involving the infringement of the railroads' rights under the equal protection clause constituted a violation of the railroads' rights under the due process clause of the United States Constitution.

The petitions to rehear were denied by the Tennessee Supreme Court by order dated April 10, 1978. *See* App. F, p. 39a; App. G. p. 40a.

REASONS FOR GRANTING THE WRIT

In these cases, the Tennessee appellate courts have refused to review, on inadequate procedural grounds, a far-reaching question of constitutional law, i.e., whether the state judiciary has the power to refuse to grant relief for undisputed violations of taxpayers' constitutional rights solely because of assumed disruption to local government finances. These are appropriate cases for the exercise of this Court's discretionary jurisdiction in order to settle this important constitutional question. State courts should not be permitted to treat constitutional rights as though such rights were subservient to the state's convenience and should not be permitted to dismiss meretorious constitutional claims on insubstantial state procedural grounds. This Court's consideration of the state's refusal to redress denial of equal protection of the law under the circumstances of these cases will serve the vital public interest of assuring full and immediate recognition of constitutional rights of all citizens regardless of inconvenience to the public purse.

I.

Certiorari Should Be Granted in Order to Establish That, Where Tennessee Courts Have Found That the Application of a Tennessee Statute Denied the Railroads Equal Protection of the Laws, the Tennessee Courts May Not Excuse Such Constitutional Violations and Deny the Railroads Immediate Relief Because of Assumed Disruption to Local Finances.

The decision of the Chancery Court was not in accord with the decisions of this Court since the danger of financial disruption erroneously found by the chancellor would not, even if real, provide a permissible basis for denial of constitutionally protected rights. The chancellor's only rationale for denying relief to the railroads, despite admitted violations of their constitutional right to equal tax treatment, was that local taxing authorities had grown dependent upon funds illegally exacted from the railroads to satisfy their budget requirements. Because the amounts unlawfully taken are large, the chancellor concluded that the result of any effective remedy would be local financial disruption. The chancellor held that this "exigency" justified the legislature's enactment of Chapter 325 which, in effect, required railroads to continue to pay an unconstitutionally disproportionate share of the total ad valorem tax burden over a five-year "transition" period. *See* App. A, p. 11a.

The Chancery Court's focus upon supposed financial inconvenience to local tax jurisdictions ignored a basic principle of constitutional law expressed by this Court in *Watson* v. *City of Memphis,* 373 U.S. 526 (1963):

> "[A]ny deprivation of constitutional rights calls for prompt rectification. The [equal protection] rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise." *Id.* at 532-33 (Emphasis in original).

Fourteenth amendment violations cannot be excused merely because compliance would be financially disruptive.

> "[I]t is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Id.* at 537.

As the Fifth Circuit Court of Appeals also noted in *Gates* v. *Collier,* 501 F.2d 1291, 1320 (5th Cir. 1974):

> "Shortage of funds is not a justification for continuing to deny citizens their constitutional rights."

The Chancery Court cited four state cases in support of its holding that courts may permit existing systems to continue after a declaration of unconstitutionality in order to effect an orderly transition from an unconstitutional to a constitutional system: *Thomas* v. *Kingsley,* 43 N.J. 524, 206 A.2d 161 (1965); *Switz* v. *Township of Middletown,* 23 N.J. 580, 130 A.2d 15 (1957); *Robinson* v. *Cahill,* 118 N.J. Super. 223, 287 A.2d 187 (1972); and *Serrano* v. *Priest,* 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). These cases offer no support for the holding of the Chancery Court.

In *Thomas,* the New Jersey Supreme Court held that the challenged legislation had not been shown to violate the uniformity clause of the state constitution, and thus the case has no relevance.

In *Switz,* the New Jersey Supreme Court ordered all underassessed property to be reassessed at 100% of

actual value but, although it deferred the effect of its judgment for two years to allow the township time to secure reappraisals and the state legislature time to enact statewide remedial legislation, it held that the discriminatory assessment of plaintiff's property would not be tolerated during the two year period, but that, on the contrary, plaintiff would be allowed her remedies for violations of her right to equal tax treatment. Thus, the *Switz* case supports the position of the railroads in these cases. Furthermore, the same court, on the same day, held that it was unconstitutional to assess railroad property at 100% of value while locally-assessed property was assessed at a lower percentage of value, and decreed that the railroad be provided immediate relief. *Delaware, Lackawanna & W.R.R.* v. *Neeld,* 23 N.J. 561, 130 A.2d 6 (1957).

Serrano and *Robinson* both involved fundamentally different questions from those presented here. In those cases, unprecedented and successful attacks were made against the constitutional adequacy of financing public education by reliance on the propery tax. Having found this method of financing unconstitutional, the courts were nevertheless constrained to permit its continuance until a constitutional method of financing public education could be devised by the legislature.

By contrast, the Chancery Court here was not faced with a question of first impression, but one with respect to which Tennessee and federal courts had recently ruled, both as to the existence of a constitutional violation and as to the constitutional requirement of an immediate remedy.

Relief did not have to be postponed in Tennessee until the legislature responded. Equality and uniformity were already required by the constitution and statutes of Tennessee. The *Southern Railway* decision and the contemporaneous *Louisville* decision both held that the railroads had a constitutionally protected right to immediate equality of tax treatment. In *Southern Railway,* the Tennessee Court of Appeals said: "[T]he decree will be effective as to all future assessments." 57 Tenn. App. at 75, 415 S.W.2d at 156. In *Louisville,* the United States District Court held that the railroad's current assessment should "be made to conform with the requirements of equal protection of the law under the Fourteenth Amendment." 249 F.Supp. at 904. Nevertheless, Chapter 325 made no pretense of affording the immediate equality of tax treatment required by those cases; rather, Chapter 325 prolonged the unconstitutional concept of property classification and the application of different assesment ratios to such classes, and frustrated compliance with the *Southern Railway* and *Louisville* decisions.

Finally, the chancellor failed to recognize that the legislature in passing Chapter 325 did not have the power either to impose differences in treatment expressly prohibited by the constitution, or to invade the province of the judiciary to fashion remedies for constitutional violations. The result of Chapter 325 was to relegate the railroads to the necessity of awaiting equalization sometime in the future in direct contravention of the court decrees in *Southern Railway* and *Louisville.* The chancellor's decision to uphold the statute thus ignored the most basic of federal constitutional principles—that a deprivation of the federally-protected right to equal treatment calls for prompt rectification.

II.

Certiorari Should Be Granted in Order to Establish That Tennessee Courts May Not Deny Review of a Substantial Federal Question on a Novel Procedural Ground Unsupported by Prior Law, Where the Existence of Such Ground Could Not Have Been Known in Time to Comply and Where Compliance Was in Any Event a Practical Impossibility.

The Tennessee Court of Appeals found that Chapter 325 was unconstitutionally applied to the railroads but refused to consider the right to immediate redress for violations of equal protection of the law and dismissed these cases on a novel and unsupported state procedural ground—failure to affirmatively allege payment under protest of taxes based on the disputed assessment. This state procedural ground lacks fair or substantial support in either the statutory or decisional law of Tennessee for the following reasons.

First, prior to the ruling in these cases, the Tennessee Supreme Court in two published opinions had accepted jurisdiction to review allegedly invalid railroad tax assessments where T.C.A. § 67-929 (1955) [now § 67-933 (1976 Repl.)], *see* App. K, p. 46a, was in effect and where, as shown on the face of each opinion, the taxes to be levied upon the disputed assessments had not been paid under protest. *Illinois Central R.R.* v. *Garner,* 193 Tenn. 91, 241 S.W.2d 926 (1951); *Nashville, C.&St.L. Ry.* v. *Browning,* 176 Tenn. 245, 140 S.W.2d 781 (1939), *aff'd* 310 U.S. 362 (1940).

Second, no Tennessee decision reviewing tax assessments, prior to the decision of the Tennessee Court of Appeals in these cases, contained the slightest indication that payment of taxes under protest was a prerequisite to review of the legality of the assessment

upon which the tax would be levied, and no Tennessee decision had ever before suggested that a taxpayer must affirmatively allege such payment under protest. To the contrary, the statute relied upon by the Tennessee Court of Appeals, T.C.A. § 67-929 (1955), governed the right to a refund or credit where the tax had been paid. Those statutes which governed the procedure to be followed in cases brought to obtain judicial review of allegedly excessive assessments, T.C.A. §§ 27-901, 902 (1955), made no mention whatsoever of payment under protest.

Third, the newly-enunciated procedural technicality is not only unsupported by substantial authority, it is also inherently unfair because it is impossible for the taxpayer to comply with its requirements. By statute, the State Board of Equalization certifies assessments in October. *See* T.C.A. § 67-929 (1955). (App. K, p. 46a.) Many tax bills are not issued until after January 1, or more than 60 days after the certification becomes final. The statutes governing the procedure for judicial review of assessments, however, mandate commencement of action within 60 days of the administrative decision without provision for an extension. *See* T.C.A. § 27-902 (1955). Therefore, an action to contest the amount of assessment must be commenced before all tax bills have been received. Furthermore, the Tennessee Supreme Court in *Nashville, C.&St.L. Ry.* v. *Marion County,* 120 Tenn. 347, 108 S.W. 1058 (1907), held that payment cannot be deemed involuntary, and thereby made under protest, unless made after delinquency and under actual threat of distraint. Property taxes in Tennessee do not become delinquent until after February 28, more than four months from the date of certification. T.C.A. §67-1105 (1955).

The Tennessee Court of Appeals eventually recognized that the rule expressed in its original opinion was impossible of compliance. However, instead of removing the unfairness, it compounded it by holding that, in order to invoke the jurisdiction of the court, the railroads were required to file an amended pleading after the taxes had been paid which affirmatively pled payment under protest. The court held further that, by failure to file such amendment, the original petition, presumably valid when filed, became invalid *ab initio* and deprived the railroads of standing to sue.

Thus, these cases, involving an important constitutional issue and millions of tax dollars, reached the Tennessee Supreme Court after the incredible procedural ruling by the Tennessee Court of Appeals. The Tennessee Supreme Court avoided all controversy by denying the petitions for certiorari, "with concurrence in results only." *See* App. D, p. 37a; App. E, p. 38a.

These arbitrary rulings by the Tennessee courts justify and call for action by this Court to prevent a total disregard of the railroads' rights under the United States Constitution. In this respect, these cases are closely analogous to *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673 (1930). There, this Court held that an interpretation of state law made by the highest court of a state which was contrary to the prior settled law of the state, which therefore could not have been foreseen or complied with by the taxpayer, and which deprived the taxpayer of a hearing, violated the taxpayer's constitutional rights. This Court stated:

> "[W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id.* at 682.

The rulings of the Tennessee courts in these cases produced a result identical with that which failed to pass constitutional muster in *Brinkerhoff-Faris.* The decision by the Tennessee Court of Appeals provided specifically that "the petitioning railroads are not entitled to a review of the assessments as made by the Board." *See* App. C, p. 34a. Thus, the Tennessee courts denied the railroads a hearing to the same extent that the state court denied a hearing to the taxpayer in *Brinkerhoff-Faris.*

The novel and unprecedented procedural rule set forth in the opinion of the Court of Appeals could not have been known to the railroads at the time they commenced their proceedings in the Chancery Court and thus they had no opportunity to comply with its requirements. This procedural rule was obviously not known to the Tennessee Attorney General because the state failed to raise the rule as a defense at any stage of the proceedings. A state procedural rule will not be permitted to frustrate vindication of constitutionally protected rights where a litigant could not have known of the existence of the rule. In *NAACP* v. *Alabama,* 357 U.S. 449 (1958), the defendant sought to resist an order compelling it to disclose its membership lists, contending that such disclosure would violate its first amendment rights. From an adverse decision in the lower state court, the defendant sought

review in the state supreme court by petition for writ of certiorari. The state supreme court held that certiorari was the wrong appellate remedy and that the exclusive remedy was by way of mandamus to quash. There were earlier Alabama cases that seemed clearly to indicate that certiorari and mandamus were available as alternative remedies for raising the federal issues. The state attempted to reconcile the latest decision with the earlier decisions on the basis of finely-drawn technical distinctions. This Court held, however, that even if the latest decision of the Alabama court did not constitute a departure from its prior rulings, the state rule was too uncertain to be permitted to bar a determination of petitioner's federal rights:

> "Even if that is indeed the rationale of the Alabama Supreme Court's present decision, such a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the state here, because *petitioner could not fairly be deemed to have been apprised of its existence.* Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights. Cf. *Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673." *Id.* at 457-58 (Emphasis added).

After this procedural technicality was enunciated for the first time by the Tennessee Court of Appeals, the railroads attempted to prove that they had in fact satisfied this technicality. On petition for rehearing, counsel for Southern Railway Company, as an officer of the court, represented to the court what everyone

associated with the case knew—that railroad taxes had in fact been paid under protest subsequent to filing petitions in the Chancery Court. Such a showing would have cured the asserted defect, but the Court of Appeals ignored the statement of counsel and summarily dismissed the railroads' petitions. This action of the Tennessee Court of Appeals is in clear conflict with the holding of this Court in *Parrot* v. *City of Tallahassee,* 381 U.S. 129 (1965). It was there asserted that the judgment below rested on an adequate independent state ground in that petitioners failed to obtain certification of the circuit court record submitted wih their otherwise timely petitions for a writ of certiorari in the Florida District Court of Appeals. Petitioners tried to correct this defect when notified of it, but their petition was dismissed. In a per curiam opinion, this Court held that this procedural ground was not adequate to bar review by this Court.

CONCLUSION

The railroads are entitled to relief from admittedly discriminatory assessments and such relief may not be denied or postponed because of possible fiscal consequences to local taxing jurisdictions. Nor may the right to relief be frustrated by resort to a novel state procedural rule, the existence of which petitioners could not have fairly foreseen. This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the Chancery Court of Davidson County, Tennessee, January 28, 1976

IN PART II OF THE CHANCERY COURT FOR
DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

No: 91642

SOUTHERN RAILWAY COMPANY

vs.

BUFORD ELLINGTON, GOVERNOR, ET AL

No: 91642-A

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC
RAILWAY COMPANY

vs.

BUFORD ELLINGTON, GOVERNOR, ET AL

No: 91642-B

HARRIMAN & NORTH EASTERN RAILWAY COMPANY

vs.

BUFORD ELLINGTON, GOVERNOR, ET AL

No: 91644

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

vs.

BUFORD ELLINGTON, GOVERNOR, ET AL

No: 92722

HARRIMAN & NORTH EASTERN RAILROAD COMPANY

vs.

BUFORD ELLINGTON, GOVERNOR, ET AL

No: 92722-A

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY

vs.

BUFORD ELLINGTON, GOVERNOR, ET AL

No: 92722-B

SOUTHERN RAILWAY COMPANY

vs.

BUFORD ELLINGTON, GOVERNOR, ET AL

No: 92770

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

BUFORD ELLINGTON, GOVERNOR, ET AL

No: 92780

CLINCHFIELD RAILROAD COMPANY and CAROLINA, CLINCHFIELD & OHIO RAILWAY

vs.

BUFORD ELLINGTON, GOVERNOR, ET AL

No: A-14

SOUTHERN RAILWAY COMPANY

vs.

BUFORD ELLINGTON, GOVERNOR, ET AL

No: A-14-A

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, on behalf of HARRIMAN & NORTH EASTERN RAILROAD COMPANY

vs.

BUFORD ELLINGTON, GOVERNOR, ET AL

No: A-14-B

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY

vs.

BUFORD ELLINGTON, GOVERNOR, ET AL

No: A-38

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

BUFORD ELLINGTON, GOVERNOR, ET AL

No: A-38-A

CLINCHFIELD RAILROAD COMPANY and CAROLINA, CLINCHFIELD & OHIO RAILWAY

vs.

BUFORD ELLINGTON, GOVERNOR, ET AL

No: A-1058

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

vs.

BUFORD ELLINGTON, GOVERNOR, ET AL

No: A-1058-A

CLINCHFIELD RAILROAD COMPANY and
CAROLINA, CLINCHFIELD & OHIO RAILWAY

VS.

WINFIELD DUNN, GOVERNOR, ET AL

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No: A-1098

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC
RAILWAY COMPANY

VS.

WINFIELD DUNN, GOVERNOR, ET AL

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GULF, MOBILE & OHIO RAILROAD COMPANY

VS.

WINFIELD DUNN, GOVERNOR, ET AL

No: A-2071

CLINCHFIELD RAILROAD COMPANY and
CAROLINA, CLINCHFIELD & OHIO RAILWAY

VS.

WINFIELD DUNN, GOVERNOR, ET AL

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SOUTHERN RAILWAY COMPANY

VS.

WINFIELD DUNN, GOVERNOR, ET AL

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CINCINNATI, NEW ORLEANS & TEXAS PACIFIC
RAILWAY COMPANY

VS.

WINFIELD DUNN, GOVERNOR, ET AL

No: A-2133

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
A Delaware Corporation

VS.

WINFIELD DUNN, GOVERNOR, ET AL

No: A-2134

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

VS.

WINFIELD DUNN, GOVERNOR, ET AL

These complaints present common questions regarding Tennessee's system of ad valorem property taxation. Specifically, they question the constitutionality of Chapter 325, Public Acts of 1967.

Within the scope of this opinion are twenty-four (24) complaints filed within the period December 26, 1968 to December 12, 1972. Upon agreement of the parties all of the captioned cases were heard and considered together after the outcome of the attempt to amend Article 2, Section 28, Constitution of Tennessee, was certain.

The complaints seek recovery of real property taxes paid by plaintiffs during the years 1968, 1969, 1970, 1971 and 1972. The ground of the complaints is that these plaintiffs were through enforcement of Chapter 325, Public Acts of 1967, (hereinafter, "Chapter 325"), unconstitutionally required to pay ad valorem taxes on their property based upon a higher assessment ratio than other taxpayers.

The specific constitutional infirmity charged to Chapter 325 is that it creates two classes of real property for purposes of ad valorem taxation in violation of the command of Article 2, Section 28, Constitution of Tennessee, as it existed during the years 1967 to 1973, that all species property be taxed uniformly.

Analysis of Chapter 325

Chapter 325 begins with a finding by the General Assembly of "great inequalities in the assessments of individual owners of property in most of the counties", and recites that "the equality and uniformity of assessment required by the Constitution cannot be completely and fairly achieved without re-evaluation of property". The purpose of the Act is stated as follows:

> Whereas, it is the intent of the General Assembly to require and assure equality and uniformity of assessment as promptly and speedily as possible, consistent with the practical difficulties of the existing situation and the need to prevent disruption and chaos of county finances;

The first substantive provision of the Act states, "All property shall be assessed and taxed according to its value . . ." There follow provisions relating to the determination of value and the time of assessment.

Section 3 of the Act provides in part that,

> All assessments of property for taxation shall be made and fixed at fifty (50%) percent of value determined pursuant to law; providing, however, that until January 1, 1973, *assessments made by county and city officers* in all counties and cities shall be made for each year at not less than the following percentage of such value:
>
> | *Tax year* | *Percentage of value as defined by law* |
> |---|---|
> | For 1968 | 15% |
> | For 1969 | 25% |
> | For 1970 | 30% |
> | For 1971 | 35% |
> | For 1972 | 40% |
> | For 1973 and thereafter | 50% |
>
> or at the median assessment ratio prevailing in the county or city for the year 1967, whichever is greater . . . (Emphasis added.)

By the quoted language Section 3 created two classes of property for ad valorem taxation: (1) that property assessed by county and city officers; and (2) all property assessed otherwise than by city and county officers.

Of course, the second class so defined consists entirely of property owned by public utilities and carriers, since T.C.A. § 67-901 provides that property owned by public utilities and carriers shall be assessed for purposes of ad valorem taxation by the Public Service Commission. All other property must be assessed by county tax assessors. T.C.A. §§ 67-601 et seq.

The Act thus requires assessment of all public utility and carrier property at fifty (50%) percent of value while permitting assessment of other property at lower rates for a five year period, 1968 through 1972. After January 1, 1973,

all property is required to be assessed at fifty (50%) percent of value.[1]

THE EQUALIZATION ISSUE

The issue presented is whether the various authorities, charged with assessing property and with equalizing assessments, acted illegally in enforcing Chapter 325.

The plaintiffs assert that this Act of the General Assembly violated Article 2, Section 28, as interpreted by the Court of Appeals in *Southern Railway Company* v. *Clement*, 57 Tenn. App. 54, 415 S.W.2d 146 (decided November 25, 1966; certiorari denied May 15, 1967) (hereinafter referred to as *Southern Railway*). In *Southern Railway* petitioners sought to compel the assessment of certain properties at one hundred (100%) percent of actual cash value. Finding that the petitioners had standing to bring such an action, since petitioners established that their properties were assessed at full value, the court sustained the writs and ordered that all future assessments of all properties be made uniformly at one hundred (100%) percent of actual cash value.

At the next sitting of the General Assembly after *Southern Railway* was decided, Chapter 325 was enacted. Chapter 325 was clearly a response to *Southern Railway*. The question presented is whether this legislative response was a constitutional one, or whether it runs afoul of principles declared in *Southern Railway* and other decisions of the courts of this state.

Clearly, the creation of different classes of property and the application of different assessment ratios to them is not uniformity, viewed absolutely. Yet, the inquiry cannot

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[1] The final result contemplated by Chapter 325 never came to pass since by 1973 the process of amending Article 2, Section 28 of the Constitution to permit classification of property for ad valorem tax purposes was complete.

end here; the circumstances of these cases compel further examination.

One such circumstance is the serious disruption of the finances of local governments which would undoubtedly result from a decree ordering the refund of substantial amounts of revenues previously collected.

It is well-known that, though Article 2, Section 28 had been in force since at least 1870, assessing bodies in Tennessee had systematically discriminated against public utilities in the matter of ad valorem taxation of property since at least the 1920's. This was done by applying higher "assessment ratios", i.e., percentages of value, to the property of utilities than to ordinary commercial, farm and residential owners. Though the tax rate was uniform, the effective tax rate for utilities was higher. This practice in Tennessee was widespread and well-known, coming to the attention even of the United States Supreme Court. *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362, 369-70, 84 L.Ed. 1254, 60 S.Ct. 968, 972 (1940).

Relying on this long-standing practice and depending on the revenues which it generated, local governments for decades spent these revenues for public services and committed the expenditure of them in the future by way of long-term bond issues for schools, parks, industrial development projects, streets and highways, etc. It would be a safe observation that if local governments discontinued all current services, closed all schools and discharged all employees, there would nevertheless be large annual budget requirements for many years to come simply to service and amortize the existing debt on fire stations, schools, industrial plants and city halls. Given this financial commitment by local governments, the sudden loss of substantial revenues would create severe disruption in the finances of many local governments, perhaps leading to insolvency by some.

The potential for severe disruption posed by decisions like *Southern Railway*, which brought to an abrupt end a

half century of illegal discrimination, has often been noticed by the courts.[2] The *Southern Railway* court itself noted that "it would probably be extremely disruptive and perhaps result in much hardship to taxpayers and chaotic confusion among public taxing authorities if long established assessment practices and tax rates based thereon be suddenly voided . . ." 57 Tenn. App. at 75, 415 S.W. 2d at 155.

Faced with such exigencies courts have permitted existing systems or vestiges of an existing system to continue after a declaration of unconstitutionality to permit an orderly transition from an unconstitutional to a constitutional system. See, e.g., *Serrano* v. *Priest*, 5 Cal.3d 584, 96 Cal.Rptr. 601, 487 P.2d 1241, 1266 (1971) (The Supreme Court pointed out that if on remand the trial court held the existing system of public school financing to be unconstitutional, then it may provide for the enforcement of the judgment in such a way as to permit an orderly transition from an unconstitutional to a constitutional system of school financing. Such a determination would not require the immediate implementation of a constitutionally valid substitute.); *Robinson* v. *Cahill*, 118 N.J.Super. 223, 287 A.2d 187, 217 (1972) (The Supreme Court declared the system of financing public schools violated the State and Federal Constitutions. The Court allowed the Legislature two years to meet the goal of equality. The ruling did not however prevent the continued operation of the existing tax laws, nor did it invalidate past or future obligations

[2] The court in *Louisville & Nashville R. Co.* v. *Public Ser. Com'n*, 249 F.Supp. 894 (1966), aff'd 389 F.2d 247 (1968), also recognized that many governmental programs had been patterned upon the existing tax structure and realized the serious disruptive effects which could occur. It therefore ordered the State Board of Equalization to rehear and reconsider the assessment, "acting in such a way as to remove from the existing assessment any invidious discrimination, with a ***minimum of disruption*** to the revenues of the state and its subdivisions." 249 F.Supp. at 904 (emphasis added).

[such as school bonds, anticipation notes, etc.] incurred under the provisions of existing school laws and tax laws.); *Switz* v. *Township of Middletown*, 23 N.J. 580, 130 A.2d 15, 25, (1957) (The court granted two years for compliance, to enable the Legislature to act, in order to avoid chaos in the New Jersey property tax system.); *Thomas* v. *Kingsley*, 43 N.J. 524, 206 A.2d 161 (1965) (The New Jersey Legislature postponed the effective date of her tax reforms and enacted a transitional tax measure to prevent interim havoc resulting from substantial shifts in tax burdens. The Supreme Court upheld the validity of this transitional legislative enactment.)

Faced with the necessity of complying with the *Southern Railway* decision while maintaining the fiscal stability of local governments, the General Assembly enacted Chapter 325 "to require and assure equality and uniformity of assessment as promptly and speedily as possible . . . and . . . to prevent disruption and chaos of county finances". The Act created a five year period during which continued unequal treatment would be tolerated, but on a schedule of decreasing inequality, and at the end of which uniformity would be achieved and sustained going forward. The clear intent was to make an orderly transition to a constitutional system as soon as practicable.

Upon the record this Court cannot find that the method selected by the General Assembly to effect orderly compliance with the *Southern Railway* decision is constitutionally intolerable. Accordingly, the complained acts of assessing and equalizing authorities, done in the execution of Chapter 325, are adjudged not illegal, arbitrary, or in excess of jurisdiction.

The petitions should be dismissed.

The Allocation Issue

In addition to the question of the constitutionality of Chapter 325, some of the above captioned complaints, no-

tably those filed by Southern Railway Company, state as a separate cause of action that the Public Service Commission and the State Board of Equalization acted arbitrarily and illegally in failing to apportion their distributable property strictly in accordance with the terms of T.C.A. § 67-920, as that section existed during the years in question. Those complaints are dealt with here.

Chapter 9 of Title 26 of the Tennessee Code was thoroughly revised by Chapter 226 of the Public Acts of 1973. Since these complaints are concerned with tax years 1968, 1969, 1970, 1971 and 1972, reference is made to Chapter 9, Title 67, as it existed prior to the revisions of 1973.

T.C.A. § 67-901 during the years in question provided in part as follows:

> The railroad and public utilities commission, hereinafter called the commission, is authorized and directed to assess for taxation, for state, county and municipal purposes all of the properties of every description, tangible and intangible, within the state, belonging to the following named persons, hereinafter referred to as companies, namely: (1) railroads; . . . The commission shall assess all of said property biennially in odd years at its actual cash value as of the same date the properties of other persons are by law assessed; . . .

The duty imposed on the Commission by the quoted statute of assessing all the property of interstate railroads and other interstate carriers is particularly difficult, since a substantial portion of the property of such a railroad or carrier is rolling stock which has no situs in this state or any other jurisdiction, but is frequently passing from one jurisdiction to another. Of course, some of the property of such an interstate railroad, such as depots, terminal facilities, etc., will have an actual situs within the state. Because of these peculiar characteristics of companies operating interstate, Chapter 9 of Title 67 provides special procedures to

be employed in the assessment of all the properties of such companies.

Chapter 9 accordingly divides the properties of interstate railroads into two classes: "localized" property and "distributable" property. T.C.A. § 67-921 defines localized property as depot buildings and other property, real, personal and mixed, having an actual situs within the state of Tennessee. It further provides that such property shall be valued separately from the distributable property and assessed for state and local purposes based upon its actual situs.

T.C.A. § 67-920 defines distributable property as the franchises, choses in action, intangible property, and personal property belonging to each company and having no actual situs in the state of Tennessee and, in the case of railroad companies, all roadbed and rolling stock. The Commission is required to value all of the distributable property of a railroad, wherever located, and to arrive at a total value of all of such distributable property. This is the so-called unitary concept of valuation, based upon the fact that the components of a railroad system derive a substantial portion of their value from being part of a complete, functioning system. Of course, under long-settled interpretation of the Commerce Clause of the United States Constitution, Tennessee is forbidden to tax the value of the entire system. Rather, Tennessee must make an allocation of that total system value to Tennessee based on some reasonable procedure. On such procedure which has been often tested for its compatibility with the Commerce Clause is the so-called "mileage" formula. *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U.S. 362, 84 L.Ed. 1254, 60 S. Ct. 968 (1940).

The General Assembly in drafting § 67-920 evidently selected the "mileage" formula as the basis on which the Commission was to make an allocation of the total value of railroad distributable property to Tennesee, providing in part as follows:

. . . after ascertaining the value of such distributable property wherever situated within the state, and after having deducted from its value one thousand dollars ($1,000.00), the commission shall divide the remainder by the number of miles of the entire length of the road in the case of railroad companies . . . and the result thereof shall be the value per mile of such distributable property of said companies, respectively, for the purpose of assessment and taxation, and the value per mile of such distributable property shall be multiplied by the number of miles in this state, and the product thereof shall be the sum to be assessed against such distributable property for state purposes, and the value per mile so ascertained shall be multiplied by the number of miles in each county or incorporated town or city, and the product thereof shall be that amount to be assessed against such distributable property for said counties and incorporated towns.

The undisputed facts in this record indicate that the Commission applied a multi-factor formula to the total system value of the distributable property of the Southern Railway Company to derive Tennessee's allocated portion of that amount for tax purposes. Specifically, the Commission averaged the following factors:

(1) Tennessee's percentage of railway operating revenue;

(2) Tennessee's percentage of ton miles revenue freight;

(3) Tennessee's percentage of tons originated and terminated.

The average of the above three factors was then averaged with Tennessee's percentage of track mileage and the resulting percentage was applied to the total system value of the distributable property of Southern Railway Company to derive Tennessee's allocated portion thereof.

Under the formula employed by the Commission, track mileage carried a weight of fifty percent in determining the Tennessee allocation, with the three other factors together contributing a weight of fifty percent. The State Board of Equalization implicitly approved this method of deriving the Tennessee allocation.

It is the contention of the plaintiffs that no factors, other than track mileage, should have been employed in deriving the Tennessee allocation. It is contended that T.C.A. § 67-920 mandatorily requires that the "mileage" formula be used exclusively in determining Tennessee's allocation of the total system of distributable property. Obviously, application by the Commission of the multi-factor formula to the case of Southern Railway resulted in a somewhat higher percentage (approximately 14%) of the total value being allocated to Tennessee than would have been allocated if solely the "mileage" formula had been applied (approximately 11.1%).

The issue presented is thus whether for purposes of determining Tennessee's allocation of the system value of distributable property the Commission must under T.C.A. § 67-920 confine itself to application of the so-called mileage formula.

It is to be noted that application of formulae other than mileage presents no necessary constitutional problem under the Commerce Clause. *Pittsburgh, C.C. & St. L. R. Co.* v. *Backus,* 154 U.S. 421, 14 S.Ct. 1114, 38 L.Ed. 1031 (1894). In fact, the provision which replaces T.C.A. § 67-920 in the 1973 revision of Chapter 9, Title 67, provides for the use of other factors specified therein, and even permits the Commission to "consider any other factors that will help determine the State's share of the unit or system value." T.C.A. § 67-922 (Chapter 226, § 11, Public Acts of 1973).

It is also to be noted that the courts have approved departures from the strict application of the "mileage" for-

mula in cases where "special circumstances" exist. See, e.g., *Kansas City, Ft. S. & M. R. Co.* v. *King*, 120 Fed. 614 (1902) (company had only 0.4 miles of main line track in Tennessee, but extensive side track where it assembled trains and interchanged cars with other railroad companies); *McCord* v. *Alabama Great Southern R. Co.*, 187 Tenn. 302, 213 S.W.2d 207 (1948) (company had 4.06 miles of main line track in Tennessee, but operated 102.17 miles of track within the Chattanooga terminal); *Browning* v. *Alabama Great Southern R. Co.*, 195 Tenn 252, 259 S.W.2d 154 (1953).

Obviously, the distributable property of an interstate railroad is *sui generis* and presents unique difficulty for the assessor. *McCord* v. *Nashville, C. & St. L. Ry.*, 187 Tenn 277, 294, 213 S.W.2d 196, 204 (1948). The attempt to establish with exactitude the actual cash value of an entire railroad system is somewhat futile; there is no "market overt" and opinion must be relied upon heavily. Likewise, the process of allocating a portion of the total system value of a railroad's distributable property to a given state is highly inexact. For that reason, the Supreme Court of the United States has never attempted to promulgate a hard-and-fast rule as to methods which states may, consistent with the Commerce Clause, employ in the making of such allocations.

It is the opinion of this Court that in drafting T.C.A. § 67-920 the General Assembly, likewise, did not intend to promulgate an inflexible rule as to the manner in which the Commission was to perform its assessment function. Rather, the General Assembly, recognizing the unique problems involved in attempting to value and apportion the property of interstate utilities and carriers, contemplated that the Commission would use its special expertise to judge and determine as accurately as practicable questions of value and apportionment and to do so within the parameters of the Commerce Clause. The "mileage" formula,

having survived many Commerce Clause battles, was a convenient standard for keeping the Commission within the requirements of the federal Constitution.

Obviously, the "mileage" formula is of great utility in making the allocation required by T.C.A. § 67-920. And this Commission did not ignore that standard here: the mileage factor carried a weight of fifty (50%) percent in determining the allocation percentage in the *Southern Railway* case.

In the view this Court takes of T.C.A. § 67-920, the Commission's consideration of factors other than mileage in making the questioned allocations, was not arbitrary or illegal. The petitions should be dismissed.

Decree accordingly, Mr. Falk will prepare decrees in all cases listed in the caption of this opinion.
January 28, 1976.

/s/ Frank F. Drowota, III
Frank F. Drowota, III
Chancellor by Designation

APPENDIX B

Opinion of the Court of Appeals of Tennessee, Western Section, December 3, 1976

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION SITTING AT NASHVILLE

SOUTHERN RAILWAY COMPANY

[AND]

LOUISVILLE and NASHVILLE RAILROAD COMPANY,
Petitioners-Appellants,

VS.

BUFORD ELLINGTON, GOVERNOR, THOMAS D. BENSON, JOE C. CARR, WILLIAM C. KEATON, WILLIAM R. SNODGRASS, CHARLIE WORLEY and WILLIAM O. BEACH, comprising the Board of Equalization of the State of Tennessee,
Respondents-Appellees.

(Honorable Frank F. Drowota, III,
Chancellor by Designation)

(FILED DECEMBER 3, 1976)

Clyde W. Key, James H. Wilson, Jr., John W. Bonds, Jr. and F. Clay Bailey for the appellant Southern Railway Company.

Philip M. Lanier and Hooker, Keeble, Dodson and Harris for the appellant Louisville and Nashville Railroad Company.

Everett H. Falk, Deputy Atty. Gen. and R. A. Ashley, Atty. Gen. for the appellees.

Joe Magill and James N. Ramsey for the intervening petitioner, Anderson County.

MODIFIED AND DISMISSED.

Opinion Filed: Dec. 3, 1976.

MATHERNE, J.

This appeal involves 24 separate certiorari proceedings filed in the Chancery Court sitting at Nashville, Tennessee against the State Board of Equalization, seeking review of the ad valorem tax assessments of the principal interstate railway companies doing business in the State of Tennessee for the years 1968, 1969, 1970, 1971, and 1972.[1]

I.

The basic argument of the railroads is that under the provisions of Chapter 325, Public Acts 1967, railroad properties were assessed by the Board at about 45% of actual cash value, whereas all other properties were assessed by local taxing authorities at much smaller percentages of actual cash value. The railroads insist that this inequality of assessment violated the following provisions of the then existing Article II, Section 28 of the Constitution of Tennessee:[2]

> All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, . . .

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[1] A consent order was entered in this Court on May 3, 1976, wherein the Court ordered that the two captioned lawsuits presented every issue to be determined in all of the 24 lawsuits before the Court, and that all of the 24 lawsuits would abide by the result in the two captioned lawsuits. The remaining railroads were granted permission to file briefs *amicus curiae* and participate in oral argument.

[2] Section 28 of Article II, Constitution of Tennessee was amended effective January 1, 1973, so that real property is now classified into four subclasses and personal property is classified into three subclasses. Property in each subclass must be assessed at a stated percentage of its value.

The railroads also claim the assessments as made violated Section 8 of Article I of the Constitution of Tennessee and the Fourteenth Amendment to the Constitution of the United States.

The relevant part of Chapter 325 is Section 3,[3] which provides as follows:

> Section 3. All assessments of property for taxation shall be made and fixed at fifty (50%) percent of value determined pursuant to law; providing, however, that until January 1, 1973 assessments made by county and city officers in all countries and cities shall be made for each year at not less than the following percentages of such value:

Tax year	*Percentage of value*
For 1968	15%
For 1969	25%
For 1970	30%
For 1971	35%
For 1972	40%
For 1973 and thereafter	50%

The record establishes that in applying Chapter 325, Public Acts 1967 during the years 1968-1972, the properties of the petitioning railroad companies were assessed by the Board of Equalization at just under 50% of actual value. During the same years the local taxing entities assessed other properties at varying percentages of actual cash value which were, on the average, substantially less than the rates applied to railroad properties by the Board.

The aggrieved railroad companies filed exceptions with the Board of Equalization for each year. Also, each year they filed a petition for writ of certiorari in the Chancery

[3] Chapter 325, Public Acts 1967 was repealed by Chapter 226, Public Acts 1973, effective as to Section 3 on January 1, 1973.

Court sitting in Davidson County, Tennessee, for a review of the assessment as made by the board for that year.

The petitioning railroad companies seek relief in the form of an order of the court to the Board of Equalization for a reassessment of their properties for the years in question, with the resulting refund by the local taxing entities of the excess taxes paid. The petitioners admit that this relief, as provided for in the then existing T.C.A. § 67-929 (now T.C.A. § 67-933), is the only remedy available to them under the law. See, *Illinois Central Railroad Company v. Garner* (Tenn. 1951) 241 S.W. 2d 926.

II.

The courts of Tennessee have consistently held that the then extant Article II, Section 28, of the Constitution of Tennessee demanded that there be but one class of property for tax purposes and that all property be assessed upon its actual cash value so that taxes paid shall be equal and uniform. See, *Carroll v. Alsup* (1901) 107 Tenn. 257, 64 S.W. 193; *Mayor and Aldermen of City of Chattanooga v. Nashville, C & St. L. R.R. Co.,* (1881) 75 Tenn. 561; *Mayor and Aldermen of the Town of Morristown v. Burke* (Tenn. 1960) 338 S.W. 2d 593; *Biltmore Hotel Court v. City of Berry Hill* (Tenn. 1965) 390 S.W. 2d 223.

We hold that Chapter 325, Public Acts 1967 is not, on its face, violative of the constitutional provision cited. That statute does not, on its face, create two classes of property for the purpose of assessment. The Board of Equalization and the local taxing authorities could have, under the statute, each taxed all property at 50% of its actual cash value for the years 1968 through 1972. The statute did not prohibit that percentage of assessment by either group, and had all properties been so assessed there would have been no constitutional issue presented.

The record reveals, however, that the application of the statute did create two classes of property: that assessed

on a state wide basis by the Board of Equalization at one rate, and that assessed at varying rates by the local taxing authorities. This application of the statute is clearly in violation of the then existing Article II, Section 28, of the Constitution of Tennessee. *Southern Railway Company v. Celment* (Tenn. App. 1966) 415 S.W. 2d 146; *Louisville and Nashville Railroad Company v. Public Service Commission* (1966) 249 F. Supp. 894, affirmed at 389 F. 2d 247. The assessments so made by the Board of Equalization are not void; those assessments are merely incorrect in some undetermined amount.

The chancellor, in effect, so found, but he denied the railroads an order of reassessment by the Board of Equalization because of the anticipated financial chaos such a reassessment would create among the local governmental entities which had received and spent the tax as paid to them for the years 1968 through 1972. The chancellor held that Chapter 325, Public Acts 1967, was a reasonable approach by the legislature toward moving from a long practiced, systematic, intentional violation of the Constitution to a constitutionally acceptable system of assessing the properties of railroad companies.

We need not review those holdings of the chancellor unless the petitioning railroad companies are, under the record, entitled to a reassessment of their properties for the years 1968 through 1972.

III.

The procedure for the reassessment of the properties of railroad and public utility companies was as set out in the then existing T.C.A. § 67-929, which provided as follows:

> *Certification by board of equalization to commission—Payment and refund of excessive tax.*—On or before the third Monday in October, said board of equalization shall certify to the commission the valuation fixed by it upon each property assessed under this chapter, and the action of the board of equalization in fixing the

> valuation upon such property shall be conclusive and final and the valuation so fixed shall be assessed against said property and the taxes due thereunder be paid. Provided, that if any railroad or public utility has been or shall hereafter be aggrieved at the assessment so fixed and certified by the board of equalization, such railroad or public utility shall be required to pay the taxes due and owing the state, the counties and municipalities, upon the full value of said assessment, under protest, and upon termination of any proceedings that may be instituted in any of the courts of this state or in any of the courts of the United States of America by such railroad or public utility to review such assessment, the state, the counties and municipalities, and any school district, road district, or other taxing district to which such taxes have been paid, shall refund in cash and with interest, such part of the taxes so paid to them as may be adjudged to be excessive or illegal by any final decree or order entered in any such proceeding, or in default of such refund, such railroad or public utility is authorized to take credit for the amount of such illegal or excessive tax with interest against any tax thereafter becoming due from and payable by such railroad or public utility, to the state, or any county, municipality, road district, school district, or any other taxing district authorized by law to levy taxes. [Acts 1919, ch. 3, § 11; 1921, ch. 39, § 1; Shan. Supp., § 859a83; Code 1932, § 1535; Acts 1939, ch. 7, § 1; C. Supp. 1950, § 1535.]

The statute clearly provides that any railroad aggrieved by an assessment fixed by the Board of Equalization shall be required to pay *under protest* the taxes due upon the full value of the assessment, and then it may seek relief in the form of a review of the assessment with a resulting refund of excess taxes paid.

Payment under protest is mandatory, and the failure to do so denies the aggrieved railroad company the right to

petition a court for an order of reassessment with the resulting refund of excess taxes paid. The petition for writ of certiorari to the Board of Equalization must establish payment under protest. In the present lawsuits there is no showing that the taxes for the years 1968-1972 were paid under protest. In fact, there is no showing that the taxes were paid; the chancellor in his memorandum did not so find or hold.

The requirement of payment under protest is reasonable because the governmental entity receiving the tax payment must be advised of the protest to enable it to give consideration to a possible refund when it weights its planned expenditures against its anticipated tax revenues.

We therefore hold that payment under protest must have been made to each local governmental entity which received payment of taxes under the assessment attacked before the taxpaying railroad company can have a review of the assessment for a refund of any excess taxes paid. This fact must be accomplished and shown on the petition for certiorari to the Board of Equalization before the taxpaying railroad has standing for a review. T.C.A. § 67-929.

The petitioner Southern Railway Company also seeks review of the decision of the Board in its allocation of the properties of that company as between the State of Tennessee and other states in which it owns property. For the same reason as above noted, that ground for certiorari is also dismissed.

It results that, for the reason stated, all petitions for certiorari are dismissed. The costs in this Court are adjudged against the petitioner-appellants.

/s/ MATHERNE
Matherne, J.

/s/ CARNEY, P. J.
Carney, P. J.

/s/ NEARN
Nearn, J.

APPENDIX C

Opinion of the Court of Appeals of Tennessee, Western Section, February 25, 1976

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION SITTING AT NASHVILLE

(CAPTION OMITTED IN PRINTING)

(FILED FEBRUARY 25, 1977)

MATHERNE, J.

On December 3, 1976, this Court filed an opinion which dismissed these lawsuits. The petitioning railroad companies have filed a Petition to Rehear insisting that the prior opinion of this Court is erroneous wherein we held that the petitioners could not maintain these lawsuits seeking a reassessment of their properties for the years under consideration because the record does not show that the taxes assessed for those years were paid under protest. After a consideration of the Petition to Rehear and a review of the record, we feel that the former opinion should be clarified. The Petitions to Rehear are, accordingly, granted. The opinion of this Court dated December 3, 1976 is hereby withdrawn and the following is the opinion of this Court in these lawsuits.

I.

This appeal involves 24 separate certiorari proceedings filed in the Chancery Court sitting at Nashville, Tennessee, against the State Board of Equalization which seek review of the ad valorem tax assessments of the principal interstate railway companies doing business in the State of Tennessee for the years 1968, 1969, 1970, 1971, and 1972.[1]

[1] A consent order was entered in this Court on May 3, 1976, wherein the Court ordered that the two captioned lawsuits presented every issue to be determined in all of the 24 lawsuits before the Court, and that all of the 24 lawsuits would abide by the result

The basic argument of the railroads is that, under the provisions of Chapter 325, Public Acts 1967, railroad properties were assessed by the Board at about 45% of actual cash value, whereas all other properties were assessed by local taxing authorities at much smaller percentages of actual cash value. The railroads insist that this inequality of assessment violated the following provisions of the then existing Article II, Section 28 of the Constitution of Tennessee:[2]

> All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value,
> . . . .

The railroads also claim that the assessments as made violated Section 8 of Article I of the Constitution of Tennessee and the Fourteenth Amendment to the Constitution of the United States.

The relevant part of Chapter 325 is Section 3,[3] which provides as follows:

> Section 3. All assessments of property for taxation shall be made and fixed at fifty (50%) percent of value

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in the two captioned lawsuits. The remaining railroads were granted permission to file briefs *amicus curiae* and participate in oral argument.

[2] Section 28 of Article II, Constitution of Tennessee was amended effective January 1, 1973, so that real property is now classified into four subclasses and personal property is classified into three subclasses. Property in each subclass must be assessed at a stated percentage of its value.

[3] Chapter 325, Public Acts 1967 was repealed by Chapter 226, Public Acts 1973, effective as to Section 3 on January 1, 1973.

> determined pursuant to law; providing, however, that until January 1, 1973 assessments made by county and city officers in all counties and cities shall be made for each year at not less than the following percentages of such value:

Tax year	*Percentage of value*
For 1968	15%
For 1969	25%
For 1970	30%
For 1971	35%
For 1972	40%
For 1973 and thereafter	50%

The record establishes that, in applying Chapter 325, Public Acts 1967 during the years 1968-1972, the properties of the petitioning railroad companies were assessed by the Board of Equalization at just under 50% of actual value. During the same years the local taxing entities assessed other properties at varying percentages of actual cash value which were, on the average, substantially less than the rates applied to railroad properties by the Board.

The aggrieved railroad companies filed exceptions with the Board of Equalization for each year. Also, each year they filed petitions for writs of certiorari in the Chancery Court sitting in Davidson County, Tennessee for a review of the assessments made by the Board for that year.

The petitioning railroad companies seek relief in the form of an order of the court to the Board of Equalization for a reassessment of their properties for the years in question, with the resulting refund by the local taxing entities of the excess taxes paid. The petitioners admit that this relief, as provided for in the then existing T.C.A. § 67-929 (now T.C.A. § 67-933), is the only remedy available to them under the law. See, *Illinois Central Railroad Company v. Garner* (Tenn. 1951) 241 S.W. 2d 926.

II.

The courts of Tennessee have consistently held that the then extant Article II, Section 28, of the Constitution of Tennessee demanded that there be but one class of property for tax purposes and that all property be assessed upon its actual value so that taxes paid shall be equal and uniform. See, *Carroll v. Alsup* (1901) 107 Tenn. 257, 64 S.W. 193; *Mayor and Aldermen of City of Chattanooga v. Nashville, C & St. L.R.R. Co.,* (1881) 75 Tenn. 561; *Mayor and Aldermen of the Town of Morristown v. Burke* (Tenn. 1960) 338 S.W. 2d 593; *Biltmore Hotel Court v. City of Berry Hill* (Tenn. 1965) 390 S.W. 2d 223.

We hold that Chapter 325, Public Acts 1967 is not, on its face, violative of the constitutional provision cited. That statute does not, on its face, create two classes of property for the purpose of assessment. The Board of Equalization and the local taxing authories could have, under the statute, each taxed all property at 50% of its actual value for the years 1968 through 1972. The statute did not prohibit that percentage of assessment by either group, and had all properties been so assessed there would have been no constitutional issue presented.

The record reveals, however, that the application of the statute did create two classes of property: that assessed on a state wide basis by the Board of Equalization at one rate, and that assessed at varying lower rates by the local taxing authorities. This application of the statute is clearly in violation of the then existing Article II, Section 28, of the Constitution of Tennessee. *Southern Railway Company v. Clement* (Tenn. App. 1966) 415 S.W. 2d 146; *Louisville and Nashville Railroad Company v. Public Service Commission* (1966) 249 F. Supp. 894, affirmed at 389 F. 2d 247. The assessments so made by the Board of Equalization are not void; those assessments are merely incorrect in some undetermined amount.

The chancellor, in effect, so found, but he denied the railroads an order of reassessment by the Board of Equalization because of the anticipated financial chaos such a reassessment would create among the local governmental entities which had received and spent the tax as paid to them for the years 1968 through 1972. The chancellor held that Chapter 325, Public Acts 1967 was a reasonable approach by the legislature toward moving from a long practiced violation of the Constitution to a constitutionally acceptable system of assessing the properties of railroad companies.

We need not review those holdings of the chancellor unless the petitioning railroad companies are, under the record, entitled to a reassessment of their properties for the years 1969 through 1972.

III.

The procedure for the reassessment of the properties of railroad companies was set out in the then existing T.C.A. § 67-929, which provided as follows:

> *Certification by board of equalization to commission—Payment and refund of excessive tax.*—On or before the third Monday in October, said board of equalization shall certify to the commission the valuation fixed by it upon each property assessed under this chapter, and the action of the board of equalization in fixing the valuation upon such property shall be conclusive and final and the valuation so fixed shall be assessed against said property and the taxes due thereunder be paid. Provided, that if any railroad or public utility has been or shall hereafter be aggrieved at the assessment so fixed and certified by the board of equalization, such railroad or public utility shall be required to pay the taxes due and owing the state, the counties and municipalities, upon the full value of said assessment, under protest, and upon termination of any proceed-

ings that may be instituted in any of the courts of this state or in any of the courts of the United States of America by such railroad or public utility to review such assessment, the state, the counties, and municipalities, and any school district, road district, or other taxing district to which such taxes have been paid, shall refund in cash and with interest, such part of the taxes so paid to them as may be adjudged to be excessive or illegal by any final decree or order entered in any such proceeding, or in default of such refund, such railroad or public utility is authorized to take credit for the amount of such illegal or excessive tax with interest against any tax thereafter becoming due from and payable by such railroad or public utility, to the state, or any county, municipality, road district, school district, or any other taxing district authorized by law to levy taxes. [Acts 1919, ch. 3, § 11; 1921, ch. 39, § 1; Shan. Supp., § 859a83; Code 1932, § 1535; Acts 1939, ch. 7, § 1; C. Supp. 1950, § 1535.]

The statute clearly provides that any railroad company aggrieved by the assessment fixed by the Board of Equalization "shall be required to pay the taxes due . . . upon the full value of said assessment, under protest, ..." The statute further provides that upon the termination of any proceeding brought by such railroad company to "review such assessment," the taxing entity "shall refund in cash and with interest, such part of the taxes so paid to them as may be adjudged to be excessive or illegal . . . ." We conclude, from the clear language of the statute, that the complaining railroad company must pay the tax under protest in order to obtain a review of the assessment with the resulting refund of excess or illegal taxes so paid. Payment under protest is a mandatory prerequisite to the right to have a review of the Board's assessment with the resulting refund of illegal or excess taxes paid.

The railroad companies argue that the above ruling is erroneous and cite the cases of *Illinois Central Railroad Company v. Garner* (Tenn. 1950) 231 S.W. 2d 352, *Illinois Central Railroad Company v. Garner* (Tenn. 1951) 241 S.W. 2d 926, and *Nashville C. & St. L. Ry. Co. v. Browning* (Tenn. 1939) 140 S.W. 2d 781 as authority for the proposition that a railroad company may have a review of an assessment fixed by the Board without having first paid the tax under protest.

The two *Garner* cases grew out of the same factual situation. The State Board of Equalization had assessed the railroad company's property for the biennium 1947-1948. The railroad company obtained an injunction from the United States District Court at Nashville which prohibited the certification of the assessment to the various taxing entities in the state. At about the same time, the railroad company filed in the Circuit Court sitting at Nashville, Tennessee, its petition for writ of certiorari which sought to set aside the assessment on the ground that the assessment was illegal, null and void. The Circuit Court held the assessment to be illegal, null and void. The injunction issued by the federal court was then dismissed. There was no appeal from the judgment of the Circuit Court. The properties of the railroad company were then reassessed under the provisions of the ruling of the Circuit Court. Certification of that portion of the assessment as related to Shelby County, Tennessee, was made, and the railroad company tendered the tax due for the year 1947 based upon the second assessment made by the Board. The trustee of Shelby County (Garner) refused the tender of the tax due and insisted that the railroad company owed statutory interest and penalties. The railroad company paid the interest and penalties under protest and filed suit in the Chancery Court sitting in Shelby County, Tennessee, for a refund. That lawsuit is reported as the first *Garner* opinion. The Supreme Court held that the railroad company owed the interest and penalties. It is obvious that the first

Garner case did not involve a review of an assessment fixed by the Board of Equalization; therefore, the opinion rendered in that lawsuit cannot in any manner be cited as authority for the position of the railroad companies in the present lawsuit. In the first *Garner* case, the only court that reviewed the assessment of the Board of Equalization was the Circuit Court sitting in Davidson County; the decision of that court was not appealed from. The fact that the Circuit Court reviewed the assessment in the absence of the payment of the taxes under protest is not authority for the proposition that taxes need not be paid under protest in order to have a review of the assessment.

The Supreme Court remanded the first *Garner* case for the entry of an appropriate decree by the chancellor. Upon remand, the chancellor permitted the railroad company to file an amended and supplemental bill which averred that Code Section 1535 (the predecessor of T.C.A. § 67-929) was not the exclusive remedy of a taxpaying railroad where the assessment is void, and that the remedies of certiorari and injunction were available in addition to the remedy prescribed by Code Section 1535. The chancellor sustained a demurrer to the bill and the railroad company appealed. That appeal resulted in the second *Garner* opinion. The Supreme Court affirmed the chancellor and held that Code Section 1535 (later T.C.A. § 67-929) was the exclusive remedy of a taxpaying railroad where it is claimed the assessment fixed by the Board is either illegal or excessive. The Court in the second *Garner* case made the following statements as related to payment under protest:

> Now Code Section 1535, under which the assessment was made in the instant case, contains substantially the same provisions as Code Sections 1793, 1794 and 1795, and is applicable alone to railroads and other public utilities. *It expressly requires the taxpayer to pay under protest,* if the tax for any reason is alleged to be illegal or unjust, and sue for reimbursement.

• • •

> It is true that the remedy for contesting its tax liability in the case at bar is as indicated in Briscoe v. McMillan, 117 Tenn. 115, 100 S.W. 111; and Ward v. Alsup, 100 Tenn. 619, 46 S.W. 573; i.e. certiorari and supersedeas to the State Board of Equalization. *But the railroad is still required to pay the amount assessed and sue for reimbursement.* If the court should hold the assessment to be void, or otherwise illegal, the State, Counties and Municipalities, must refund at once the amount each had received under the illegal assessment . . . .
>
> *The judgment of the court, voiding the assessment, would be conclusive of the taxpayer's right to have restitution.* (Emphasis added)

The second *Garner* case is, therefore, authority for the holding of this Court in the present lawsuit. The second *Garner* case specifically requires payment under protest in order to have a review of the assessment fixed by the Board.

The petitioning railroad companies also rely upon *Nashville C. & St. L. Ry. v. Browning* (Tenn. 1939) 140 S.W. 2d 781. There the railroad company filed in the Circuit Court sitting in Davidson County, Tennessee, a petition for writs of certiorari and supersedeas to the State Board of Equalization to review the action of the Board in fixing the value of the petitioner's property for taxation. The trial court dismissed the petition and the Supreme Court affirmed. In the *Browning* case no mention is made as to whether the taxes as assessed were paid under protest. We hold that the *Browning* case cannot be cited as authority one way or the other on the issue of the necessity for payment under protest in order to have a review of the assessment under T.C.A. § 67-929. Compare the reasoning of the Court in *Fentress County Bank v. Holt* (Tenn. 1976) 535 S.W. 2d 854.

We conclude from the plain verbiage of T.C.A. § 67-929 and from the second *Garner* opinion (241 S.W. 2d 926) that: (1) the method for reviewing an assessment fixed by the Board of Equalization is by petition for writ of certiorari to the Board; (2) the requirement of payment under protest of the taxes under the full value of the assessment is mandatory in order to obtain a review of the assessment with the resulting refund of any illegal or excess taxes so paid; and (3) a final decision by the courts that there was an illegal or excessive assessment results in a refund of the illegal or excess taxes which had been previously paid under protest. The records in these lawsuits do not show payment under protest as required by T.C.A. § 67-929; therefore, the petitioning railroads are not entitled to a review of the assessments as made by the Board.

IV.

The railroad companies argue that the foregoing requirement of payment under protest denies them their right of review. The railroads point out that they are required under T.C.A. § 27-902 to file their petition for writ of certiorari within 60 days from the entry of the order of the Board. We agree that Section 27-902 governs the time within which these various petitions for certiorari must be filed.

The petitioning railroads argue that it is impossible for them to pay the tax under protest and file the petitions for writ of certiorari within 60 days after the order of the Board which fixes the assessment. The railroads argue that this Court should take judicial notice of that impossibility of performance on their part. After a review of the statutes governing the assessment and the certifications of the assessment, we will not take judicial notice of this claimed impossibility of proper performance by the railroads with the 60 days allowed therefor.

But, if it be shown that a railroad company could not pay the taxes under protest prior to filing the petition for certiorari within the time allowed, that fact does not in any manner deny the railroad company its right to a review of the assessment. In that situation the railroad company may allege in its petition the impossibility of payment under protest within the time allowed, and further allege that the taxes will be paid under protest and that the fact of such payment will be shown to the court by supplemental pleading. Thereafter, when the railroad company, using due diligence, pays its taxes under protest it need only establish that fact by supplemental pleading and it can have its review of the assessment.

This procedure is clearly provided for in Rule 15.04, Tennessee Rules of Civil Procedure, which reads as follows:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

The foregoing Rule became effective on January 1, 1971. The Rule, however, is merely declaratory of the procedure followed prior to its adoption. See *Bannon v. Jackson* (1908) 121 Tenn. 381, 117 S.W. 504; *Atkinson v. Railroad Employes' Mutual Relief Society* (Tenn. 1929) 22 S.W. 2d 631; *Phifer v. Mutual Ben. Health & Accid. Ass'n.* (Tenn. App. 1940) 148 S.W. 2d 17; 1 *Gibson's Suits in Chancery*, §§ 726-738 (5th ed. 1955). The petitioning railroads could have followed this procedure both before and after the

adoption of the Rules of Civil Procedure. We conclude that the railroad companies were in no manner denied their right of review, but, to the contrary, a plain, adequate, and speedy remedy was available to them, conditioned upon the payment of the taxes under protest.

We therefore hold that the record must show payment under protest to each local governmental entity entitled to payment of taxes under the challenged assessment before the taxpaying railroad company can have a review of the assessment with the resulting refund of the illegal or excessive taxes so paid. T.C.A. § 67-929.

The petitioner Southern Railway Company also seeks review of the decision of the Board in its allocation of the properties of that company as between the State of Tennessee and other states in which it owns property. For the same reasons as above noted, that ground for certiorari is also dismissed.

It results that, for the reasons stated, all petitions for certiorari are dismissed at the cost of the petitioners-appellants.

/s/ MATHERNE
Matherne, J.

/s/ CARNEY
Carney, P. J.

/s/ NEARN
Nearn, J.

APPENDIX D

Order of the Supreme Court of Tennessee.
(Southern Railway Company).
January 16, 1978

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

DAVIDSON EQUITY

SOUTHERN RAILWAY COMPANY, *Petitioner*

vs.

BUFORD ELLINGTON, ET AL., *Respondents,*

(Filed January 16, 1978)

Order

On considering the petition for certiorari and briefs filed in this case and the entire record, the petition of Southern Railway Company is denied with concurrence in results only, at cost of the petitioner.

Not participating: Per Curiam

Harbison, J.

APPENDIX E

**Order of the Supreme Court of Tennessee.
(Louisville and Nashville Railroad Company).
January 18, 1978**

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

DAVIDSON EQUITY

L&N RAILROAD, *Petitioner*

VS.

BUFORD ELLINGTON, ET AL., *Respondents*

(Filed January 18, 1978)

Order

On considering the petition for certiorari and briefs filed in this case and the entire record, the petition of the L & N Railway is denied with concurrence in results only, at cost of the petitioner.

PER CURIAM

Not participating:

Harbison, Jr.

APPENDIX F

**Order of the Supreme Court of Tennessee.
(Southern Railway Company).
April 10, 1978**

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

DAVIDSON EQUITY

SOUTHERN RAILWAY COMPANY, *Petitioner*

VS.

BUFORD ELLINGTON, ET AL., *Respondents*

(FILED APRIL 10, 1978)

Order

The petition of the Southern Railway Company to rehear this court's denial of the petition for certiorari is denied. Costs attendant the filing of the petition are adjudged against Southern Railway Company.

PER CURIAM

APPENDIX G

Order of the Supreme Court of Tennessee. (Louisville and Nashville Railroad Company). April 10, 1978

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

DAVIDSON EQUITY

L & N RAILROAD, *Petitioner*

VS.

BUFORD ELLINGTON, ET AL., *Respondents*

(FILED APRIL 10, 1978)

Order

The petition of the L & N Railroad to rehear this court's denial of the petition for certiorari is denied. Costs attendant the filing of the petition are adjudged against the L & N Railroad.

PER CURIAM

APPENDIX H

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

Article 2, § 28, of the Tennessee Constitution (1955)

Sec. 28. Taxable property—Valuation—Rates.—All property real, personal or mixed shall be taxed, but the Legislature may except such as may be held by the State, by Counties, Cities or Towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except one thousand dollars worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer, and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the Legislature shall have power to tax Merchants, Peddlers, and privileges, in such manner as they may from time to time direct. The portion of a Merchants Capital used in the purchase of Merchandise sold by him to non-residents and sent beyond the State, shall not be taxed at a rate higher than the ad valorem tax on property. The Legislature shall have power to levy a tax upon incomes derived from stocks and bonds that are not taxed ad valorem.

All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any County or Corporation levy a poll tax exceeding the amount levied by the State.

APPENDIX J

Chapter 325 of the Tennessee Public Acts of 1967

AN ACT with respect to the assessment of property for taxation and to repeal all statutes inconsistent herewith, including but not limited to Tennessee Code Annotated, Section 67-605.

WHEREAS, there have been found to exist great inequalities in the assessments of individual owners of property in most of the counties of the State of Tennessee, so that the reported median assessment ratio cannot be relied upon as a guide to any common level of assessments within the county and the median assessment ratios themselves vary widely among the various counties; and

WHEREAS, the equality and uniformity of assessment required by the Constitution cannot be completely and fairly achieved without reappraisal and revaluation of property; and

WHEREAS, reappraisal by competent appraisers is time consuming and expensive and reappraisals cannot be carried on simultaneously in all counties for lack of qualified appraisal firms and other reasons; and

WHEREAS, it is the intent of the General Assembly to require and assure equality and uniformity of assessment as promptly and speedily as possible, consistent with the practical difficulties of the existing situation and the need to prevent disruption and chaos of county finances;

Be it enacted by the General Assembly of the State of Tennessee:

SECTION 1. All property shall be assessed and taxed according to its value, which shall be ascertained from the evidences of its sound, intrinsic and immediate value, for purposes of sale between a willing seller and a willing buyer without undue consideration of speculative values.

• • • •

SECTION 3. All assessments of property for taxation shall be made and fixed at fifty (50%) percent of value determined pursuant to law; providing, however, that until January 1, 1973 assessments made by county and city officers in all counties and cities shall be made for each year at not less than the following percentages of such value:

Tax year	*Percentage of value as defined by law*
For 1968	15%
For 1969	25%
For 1970	30%
For 1971	35%
For 1972	40%
For 1973 and thereafter	50%

or at the median assessment ratio prevailing in the county or city for the year 1967, whichever is greater, as determined by the State Board of Equalization. For 1967 the assessments of property in each county shall not be less than the median assessment ratio prevailing in such county for the year 1966 as determined by the State Board of Equalization. Whenever a reappraisal has been completed for any city or county, and approved by the State Board of Equalization, the city or county may thereafter at any time prior to January 1, 1973, and on and after January 1, 1973, shall assess all property at not less than 50% of appraised value. The State Board of Equalization shall proceed to notify such counties as shall be required, to proceed with an equalization program in order that the provisions of this Act, relative to minimum percentage assessment levels, may be accomplished according to the schedule set forth herein.

• • • •

SECTION 5. In each county and city, local boards of equalization shall fix the values of properties within their jurisdiction so that value thereof shall conform to the requirements of Section 3 of this Act.

SECTION 6. All laws and statutes inconsistent with this Act are hereby repealed, including but not limited to Tennessee Code Annotated, Section 67-605, and to the same extent as if the inconsistent law or statute had been specifically referred to and identified.

SECTION 7. This Act shall take effect from and after its passage, the public welfare requiring it.

Passed: May 25, 1967.

FRANK C. GORRELL,
Speaker of the Senate.

JAMES H. CUMMINGS,
Speaker of the House of Representatives.

Approved: May 26, 1967.

BUFORD ELLINGTON,
Governor.

APPENDIX K

Tennessee Code Annotated, § 67-929 (1955)

67-929. *Certification by board of equalization to commission—Payment and refund of excessive tax.*—On or before the third Monday in October, said board of equalization shall certify to the commission the valuation fixed by it upon each property assessed under this chapter, and the action of the board of equalization in fixing the valuation upon such property shall be conclusive and final and the valuation so fixed shall be assessed against said property and the taxes due thereunder be paid. Provided, that if any railroad or public utility has been or shall hereafter be aggrieved at the assessment so fixed and certified by the board of equalization, such railroad or public utility shall be required to pay the taxes due and owing the state, the counties and municipalities, upon the full value of said assessment, under protest, and upon termination of any proceedings that may be instituted in any of the courts of this state or in any of the courts of the United States of America by such railroad or public utility to review such assessment, the state, the counties and municipalities, and any school district, road district, or other taxing district to which such taxes have been paid, shall refund in cash and with interest, such part of the taxes so paid to them as may be adjudged to be excessive or illegal by any final decree or order entered in any such proceeding, or in default of such refund, such railroad or public utility is authorized to take credit for the amount of such illegal or excessive tax with interest against any tax thereafter becoming due from and payable by such railroad or public utility, to the state, or any county, municipality, road district, school district, or any other taxing district authorized by law to levy taxes.

APPENDIX L

Tennessee Code Annotated, § 27-901, 902 (1955)

27-901. *Right of review.*—Anyone who may be aggrieved by any final order or judgment of any board or commission functioning under the laws of this state may have said order or judgment reviewed by the courts, where not otherwise specifically provided, in the manner provided by this chapter.

27-902. *Filing and contents of petition.*—Such party shall, within sixty (60) days from the entry of the order or judgment, file a petition of certiorari in the chancery court of any county in which any one or more of the petitioners, or any one or more of the material defendants reside, or have their principal office, stating briefly the issues involved in the cause, the substance of the order or judgment complained of, of the respects in which the petitioner claims the order or judgment is erroneous, and praying for an accordant review.

APPENDIX M

Tennessee Code Annotated, § 67-1105 (1955)

67-1105. *Payment to trustee—Penalty for delinquency.*—Every taxpayer shall pay his state, county, municipal, highway, school and all his property and poll taxes to said county trustee, except when otherwise provided by law; and said taxes shall be due and payable on the first Monday in October of each year, and shall bear interest from the first day of May following, and, in addition, a penalty of one-half of one per cent (½%) for each month the taxes are delinquent to be added on the first day of each month, beginning with the first of March, except as otherwise provided in regard to municipal and poll taxes.